

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of :
Christian BAUER : Confirmation No. 9896
U.S. Patent Application No. 10/767,745 : Group Art Unit: 3632
Filed: January 30, 2004 : Examiner: Alfred J. WUJCIAK
For: RETAINING MEMBER

REPLY BRIEF

Commissioner For Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sirs:

In the Examiner's Answer the Examiner has rebutted the Appellant's position(s) and has inherently raised quasi new points of argument that need to be rebutted.

In the Examiner's 'Response to Argument' the Examiner states:

The appellant argues Byerly's invention is intended to be "wrapped" about a bundle of wires or a corrugated tube with two distinct diameters while the base reference with Ruckwardt is directed to supporting a single tube-shaped part which is clearly going to be "pressed" into place and it is not intended to be wrapped about an element such as fuel pipe.

The examiner disagrees with the appellant because Ruckwardt and Byerly are analogous arts with holder [sic] that is designed to retain tube/pipe on a support structure. The recess in Ruckwardt's invention has same function as Byerly's recess for retaining such as wrapping about the tube/pipe.

At this point the Appellants must point out that just being "analogous art" is insufficient to establish a *prima facie* case of obviousness. A (flexible) rope and an essentially rigid clamp can be used to achieve similar ends such as securing something in place, but this is where the analogy ends and does not mean that one would suggest a modification of the other.

The Examiner continues to state:

Furthermore, Ruckwardt and Byerly show ribs in the recess however Ruckwardt's ribs do not vary in diameter like Byerly's ribs. The Examiner is using Byerly's invention as a secondary reference for modifying Ruckwardt's ribs into [sic] vary diameter as taught by Byerly's ribs to provide gripping support for gripping on tube/pipe with grooves on the outer surface and prevent tube/pipe from slipping out of the holder.

It is submitted that the hypothetical person of ordinary skill has no way of known what the Byerly references should be relied upon with the detriment of the remaining teachings and is obliged under § 103 to consider the reference as a whole.

Appellants point out that Byerly only has a recess when it is wrapped about something or folded into the state shown in Figs. 1 and 2. Ruckwardt has fixed structures into which the ribs extend due to the very configuration of the plastic holding assembly not because the device has been physically force from one configuration to another.

Further, it would appear that the projections in Byerly not only vary in the diameter, but in height. The Examiner's reliance on the difference in diameter has ignored the more important change in height and the role that this will play when the arrangement is wrapped into the Fig. 6 configuration.

It is noted that the Abstract of Byerly mentions different projection heights however contains no mention of diameter differences.

It is not understood as to why the hypothetical person of ordinary skill would consider changing the "diameter" of the projections in Ruckwardt in view of the disclosed change in "height" in Byerly. In the absence of any disclosure to the effect that diameters are varied, it is solely the drawing and what can be gleaned therefrom that is being used in this rejection.

Since there is no indication that the drawings are drawn to scale in Byerly, the Examiner is not permitted to draw inferences from the drawings as appears to be the case in this instance. Indeed, there is no requirement that patent drawings must be made to scale, and, unless there is a specific indication in the document that such is the case, then the Examiner may not assume this fact and rely on measurements which can be taken from the drawings to facilitate a *prima facie* case of anticipation. See MPEP § 2125 and the passages discussing *In re Wright*, 569 F. 2d 1124, 193 USPQ 332 (CCPA 1977).

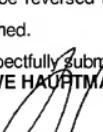
The Examiner continues to state:

The appellant stated the examiner misinterpreted #56 is a convex curve and #57 is a concave curve in Kropf's invention. Furthermore, the appellant stated "This structure would not lead the hypothetical person of ordinary skill to the conclusion that the tops of the protrusions which are shown in Ruckwardt could be shaped in the manner purported in this rejection." The examiner disagrees with the appellant because the projection part on both edges of element 56 in Kropf's invention are considered as convex curve and element 57 in Kropf's invention clearly shows the curve is in concave configuration for securing pipe/tube therein. Ruckwardt and Kropf are analogous arts for retaining pipe/tube/cable on holder to mount on support surface. Ruckwardt and Kropf teach recess having rib for retaining pipe/tube/cable but Ruckwardt fails to show the rib has concave curve. Since Kropf shows rib having concave curve, it is obvious to have modified Ruckwardt's rib into concave curves as taught by Kropf to prevent the pipe/tube/cable from slipping out of the holder.

This is basically 'its know so its obvious.' There is nothing in Kropp that would suggest that the tops of the projections found in Ruckwardt or Byerly, should be reshaped from convex to concave or vice versa, to assume the configuration found in Kropp. Indeed, common sense would dictate that the tips of the projections shown in Byerly need to be shaped in the manner shown in the figures of this reference in that projection (penetration) into and amongst the bundle of wires (See Fig. 6 in particular) or the corrugations of the pipe illustrated in Fig. 2, is intended so as to achieve the desired gripping effect that is illustrated in these drawings.

It is requested that the rejections be reversed for at least the reasons that a *prima facie* case of obviousness has not been established.

Respectfully submitted,
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